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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE AMICUS CURIAE MEMORANDUM OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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December 27, 1951.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 190 F. (2d) 951. The opinion of the District Court is reported in 86 F. Supp. 716.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

STATUTES INVOLVED

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

STATEMENT

The facts are stated in the respondents' brief in opposition to the petition heretofore filed. A more complete statement is found in the opinion of the Court of Appeals. 190 F. (2d) 951.

ARGUMENT

The amicus curiae memorandum by the United States seeks to retry the facts of this case in this Court. The merits of this private litigation have been resolved against the plaintiff-petitioner by the District Court and the Court of Appeals. The Court of Appeals did not content itself with the mere affirmance of the finding of no conspiracy as it might have done under Rule 52. It went further and demonstrated that the evidence clearly established that no conspiracy existed in Buffalo or Lackawanna, as alleged by plaintiff in its complaint.

Petitioner alleged a general over-all conspiracy, in which eleven defendants participated to monopolize first and second run exhibition in Buffalo and Lackawanna, and alleged that as

a result of that conspiracy petitioner suffered damage and injury to its theatres. Petitioner subsequently abandoned its claims as to all but the Bailey theatre (a second run neighborhood theatre) and the Government makes no issue as to the alleged operation of the conspiracy with respect to the other theatres of which petitioner originally complained. It is significant that neither petitioner nor the Government contends that as a matter of law the findings with respect to petitioner's other theatres, the Century or Lackawanna, constitute error although the same joint ownership* existed in those situations.

The Court of Appeals recognized the implausibility of petitioner's allegation as to the over-all conspiracy and said (190 F. (2d) 951, 960):

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*The "joint ownership" or "joint interest" of certain theatres in Buffalo simply means this—that the Shea interests, Paramount and Loew each owned stock in a corporation called Buffalo Theatres, Inc., which was the lessee and operator of the Kensington theatre in competition against petitioner's Bailey theatre. The only evidence as to the origin of this joint interest is found in the record in the *Paramount* case and is as follows (R. 1934):

> "Q. Have Paramount and Loew's stock interests in Buffalo Theatres, Inc., which operates certain theatres in the Buffalo area? A. Yes.
>
> Q. How were those interests acquired? A. Prior to 1934 Paramount and Mike Shea were the only stockholders in certain corporations which leased and operated certain theatres in Buffalo. Loew's was the landlord of one of those theatres—the Great Lakes. Those corporations were in default in rent when Paramount-Publix went into receivership. Paramount-Publix had guaranteed the rent of the Great Lakes, and as a consequence, Loew's had a substantial claim against Paramount. There being no money available to satisfy this claim and the claims of the other landlords for rent, Buffalo Theatres Inc. was formed to take over the operation of the theatres and the landlords, creditors and former stockholders of the Lessee companies received stock in the new company.
>
> Q. Does Paramount operate these theatres? A. To the best of my knowledge Paramount has had nothing to do with the operation of the theatres since 1934."

> "There is also an inherent lack of plausibility in the complaint as a whole. If the defendants were engaged in a conspiracy to monopolize first and second run exhibitions in Buffalo, why would Shea fail to retain control of the Bailey and the Century in 1939, when it appears that it was offered a chance to buy the Bailey and renew the lease on the Century? If the theatres were as profitable as Dipson would have us believe, Shea would naturally have kept them. Furthermore, the complaint was dismissed as to the defendants Universal and Columbia and in so far as it applied to the Ridge Theatre, and no appeal has been taken from the dismissal. A conspiracy among the six remaining distributor defendants aimed at only two of the plaintiff's many theatres while all but Paramount and Loew favored the plaintiff elsewhere (and even they licensed it in Tonawanda) would seem to have been futile. Such a conspiracy would be entirely different from that shown in the *Paramount* case which apparently favored large combines such as Dipson. Also RKO, United and Warner did not regularly favor Shea even in the two theatres remaining at issue."

The injury allegedly suffered by the plaintiff-petitioner was laid by it to a conspiracy to which the parties were not only the two distributor defendants jointly interested with the exhibitor defendant but also six other distributing company defendants who concededly held no proprietary interest in any theatres in Buffalo. The finding below that the defendant exhibitors had achieved no local monopoly is not sought to be overturned. There is also acquiescence in the finding that the defendant exhibitors have not conspired to monopolize local exhibition in Buffalo to the exclusion of the plaintiff, and acquiescence in the finding that the conduct of the other distributor defendants demonstrated conclusively that they had

not confederated with the local exhibitors to foster and perpetuate any local exhibition monopoly in Buffalo.

In the trial below on the merits, plaintiff had the full benefit of the principles of law established in the decisions of this Court and of the District Court in the *Paramount* case. Complete and detailed findings of fact and conclusions of law were entered to the effect that there was no conspiracy and that the defendants' activities did not damage plaintiff in its property or business. There is no principle of law established in the *Paramount* case which requires a result different from that reached by the District Court and affirmed by the Court of Appeals.

The complaint did not allege any damaging impact on the plaintiff's business or property as a result of any stock interest of Paramount and Loew's in Buffalo Theatres and did not claim any damages on account of the existence of any such stock interest. The case was instituted, tried and determined solely as a general conspiracy case, that is, as a case of a conspiracy among all the defendants to deprive the plaintiff of the run of pictures which it wanted in three of its theatres. The plaintiff failed to prove any such conspiracy.

The petitioner made no attempt whatsoever before the Court of Appeals to demonstrate that any one of the essential findings of fact on the conspiracy issue was clearly erroneous. The court below, therefore, properly and necessarily affirmed the judgment of the District Court (*United States* v. *Yellow Cab Co.*, 338 U. S. 338).

Petitioner and the Government now attempt to argue that because Loew's, Paramount and McFaul (Shea) each owned stock in Buffalo Theatres, Inc., operator of theatres in Buffalo, this Court, as a matter of law, must reverse the trial court's findings of facts, affirmed on appeal, with respect to the Bailey

theatre. It is their contention that, regardless of the specific findings by the trial court that each distributor acted independently, the joint ownership, alone, is sufficient to constitute conclusive evidence of an over-all conspiracy among all eleven defendants which, contrary to the findings below, injured the plaintiff in his business or property.

No principle of law established by this Court in the *Paramount* case obviated the necessity of petitioner's showing the existence of the alleged conspiracy and that such conspiracy damaged it in its business or property. The mere existence of the joint ownership of theatres could not require entry of judgment in petitioner's favor unless it was alleged and proved to be part of the alleged over-all conspiracy in Buffalo and shown by the evidence to have been the direct cause of injury to the plaintiff. There was no such conspiracy and no proof of such injury. This issue was previously decided in *Fifth and Walnut* v. *Loew's, Incorporated*, 176 F. (2d) 587 (C.A. 2nd, 1949). This Court denied certiorari, 338 U.S. 894 (1950), and rehearing was denied 338 U. S. 940.

The trial court below clearly found that although a joint ownership of theatres existed in Buffalo, it had no impact on petitioner's theatres. The Court of Appeals reviewed all the findings in considering the effects of the joint operation on petitioners and said (190 F. (2d) 951, 960):

> "Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain suffi-

> cient films to exhibit at the Century and Bailey (al though it did not obtain all it desired). Had a monop oly been the aim of Loew and Paramount, they would have caused Shea to retain control of the Century and Bailey. We hold that their activities did not show a joint action that should upset the finding that no con spiracy existed between them."

Neither court below found any violation of the Sherman Act in Buffalo, North Tonawanda or Lackawanna by the defendants or any attempt to monopolize on the part of Loew's and Paramount through their joint interest with McFaul in Shea. The only monopoly attempted in Buffalo was by the petitioner itself. Concerning Dipson's attempts to monopolize, the Court of Appeals said [190 F. (2d) 951, 960]:

> "As we have said, had Dipson's demands been acceded to by the distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly."

In the face of specific findings of fact by the District Court, fully supported by the evidence, that plaintiff-petitioner had not been injured by any action of the defendants, the amicus curiae memorandum attempts to show injury to plantiff by means of its own interpretation of one exhibit (Pl. Ex. 136). In view of the attempt of the United States as amicus curiae to bolster the petitioner's case on the merits by arguing that because of the change in ownership the Bailey was "demoted" to third run and the Kensington "promoted" to second run, we also call attention to the forty-fifth and part of the forty-seventh findings of fact of the District Court as follows:

> "By 1936, Buffalo was showing half of the better pictures at the Kensington ahead of the Bailey and half at the Bailey ahead of the Kensington. Thereafter, and in the 1937-1938 season, the management began to show more of the better pictures at the Kensington ahead of the Bailey" (R. 55).
>
> (A): "Prior to plaintiff's acquisition of the Bailey in 1939, RKO exhibited its better pictures and a majority of its pictures at the Kensington ahead of the Bailey and in the 1937-38 and 1938-39 seasons RKO received more money in license fees from the exhibition of its pictures at the Kensington than at the Bailey" (R. 57).

The amicus memorandum would have an inference of fact drawn by this Court in flat contradiction to the findings of the District Court concurred in by the Court of Appeals. But such findings are final unless there is an exceptionally strong showing of error. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949), *cf. Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3 (1936); and *Comstock* v. *Group of Investors*, 335 U. S. 211, 214 (1948). We respectfully submit that the above stated difference of opinion between the amicus curiae and the District Court is not proper support for a petition for certiorari.

In addition, we call attention to Judge Hand's opinion which clearly shows that there was more than ample evidence supporting the findings of fact made by the District Court as to lack of injury to plaintiff resulting from any acts of the defendants. Judge Hand said:

> "In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the de-

> cision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood."

The amicus memorandum urges that the supervisory power of this Court should be exercised because the Court of Appeals said that the joint ownership of theatres by Paramount, Loew's and Shea in Buffalo was not illegal as such. As previously shown, that statement was not determinative of the case at bar. The findings in this case which are not sought to be disturbed establish that no injury to plaintiff resulted from this joint ownership. Even if the joint ownership here involved were held to be illegal *per se*, the question presented by the amicus memorandum is academic. Furthermore, nothing decided in *United States* v. *Paramount* is in conflict with this statement. It is clear that this joint ownership was not conceived for the purpose of monopoly (see footnote, p. 3, *supra*).

The amicus curiae memorandum in claiming that Judge Hand misinterpreted the *Paramount* case in his decision in this case completely overlooks the fact that Augustus N. Hand, Circuit Judge, presided over the Expediting Courts which tried the *Paramount* case, both before and after remand, and that both

of the opinions of the Expediting Courts were written by Judge Hand. Such claim also overlooks the fact that in deciding the instant case Judge Hand specifically stated that he was fully aware of the principles decided in the *Paramount* case, for he said (p. 958):

> "Of course, the activities revealed in the *Paramount* case lead us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere."

The memorandum by the Government has advanced no argument which demonstrates that Judge Hand misconceived the holdings of this Court in the *Paramount* case concerning joint interests. In fact, the question of the scope of this Court's decision in connection with joint interests was previously decided in *Fifth and Walnut* v. *Loew's Incorporated,* 176 F. (2d) 587 (C. A. 2nd, 1949). This Court denied certiorari, 338 U. S. 894 (1949), and rehearing was denied, 338 U. S. 940 [See pages 10-12 of Respondents' Brief In Opposition To The Petition]. In that case the Court of Appeals for the Second Circuit said (p. 590):

> "The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of *course, no one could reasonably contend that every joint ownership of a*

> *theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made.*" (Italics supplied.)

The discretionary exercise of this Court's supervisory power is sought to be invoked on the suggestion that other private litigation pending in several District Courts of the United States contain issues of injury suffered by illegal discrimination in favor of jointly owned theatres. But there was no amicus curiae memorandum filed by the Government when a similar question was presented in *Fifth and Walnut* v. *Loew's Incorporated*, 176 F. (2d) 587 (C. A. 2nd, 1949), cert. den. 338 U. S. 894, rehearing den. 338 U. S. 940. Seven private cases are referred to by the amicus memorandum in its footnote 5. In six of those cases the appearances for the respective plaintiffs are by former members of the Antitrust Division of the Department of Justice who, at one time or another, appeared as attorneys for the Government in the *Paramount* case. It is far fetched for the amicus memorandum to suggest that the disposition of this case on the facts advertently found in the two courts below would inevitably bring about a perversion of the application of *United States* v. *Paramount* in other private litigation.

Neither petitioner nor the Government gains any support for its position from this Court's decision in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951). The amicus memorandum suggests that the purpose of Section 5 of the Clayton Act as applied in the *Emich* case is in some way violated by the decision below. But it is obvious that the application of Section 5 was not before the trial court or the Court of Appeals. The decree in the *Paramount* case was not and could not have been offered in evidence. Petitioner concedes this. Moreover, even if petitioner had had the benefit of the decree, such decree would have been only *prima facie* evidence and could not have required the trial court to enter judgment for petitioners.